UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MOUNTAIRE FARMS, INC, Employer, and OSCAR CRUZ SOSA, Petitioner and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 27, a/w UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO Union,	)	Case 05-RD-256888

BRIEF OF *AMICI CURIAE* U.S. POULTRY & EGG ASSOCIATION AND NATIONAL CHICKEN COUNCIL

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BRIEF OF *AMICI CURIAE* ON THE QUESTION OF THE CONTRACT BAR DOCTRINE AND ITS APPLICATION TO THE FACTS OF THE CASE

Pursuant to the Notice and Invitation to File Briefs of the National Labor Relations Board ("NLRB") dated July 7, 2020, together with the NLRB's extension of time to file briefs, U.S. Poultry & Egg Association and the National Chicken Council ("NCC") submit this *amici curiae* brief on the question of whether to eliminate, modify, or retain the Contract Bar Doctrine, and whether the rulings below as applied to the current case are correct.

INTEREST OF *AMICI CURIAE*

The U.S. Poultry & Egg Association ("USPoultry") is the world's largest poultry organization. The NCC is a trade organization that represents the vast majority of U.S. chicken processors. Both trade associations are interested in supporting the determination of whether and to what extent workers in the industry have appropriate standards to determine whether and to what extent they wish to be represented by a collective bargaining representative.

INTRODUCTION

This brief addresses the ruling of the Regional Director of April 8, 2020, that because the Collective Bargaining Agreement (Agreement) between Mountaire Farms, Inc. (Mountaire) and United Food & Commercial Workers Union, Local 27 (UFCW Local 27) contained an unlawful union security clause, the Agreement could not serve as a contract bar for a petition seeking to decertify the union. The Board's Notice and Invitation sought amici briefs to address whether the Board should: (1) rescind the Contract Bar Doctrine; (2) retain it as it currently exists; or (3) retain the doctrine with modifications. With respect to (3), the parties are invited to specifically address various related issues.

ARGUMENT

In general, this Brief supports Petitioner Oscar Cruz Sosa (Petitioner) and the employer (Mountaire) that the current Board-created application of the contract bar conflicts with the National Labor Relations Act's (Act or Labor Act) primary Section 7 rights, and should be eliminated. Further, if the Board retains any contract bar, it should be valid for no more than one year and begin to run no less than 45 days after the employer and union provide information to employees that a contract was executed and have the information sufficient to make an informed decision about retaining their union representation. This window period should be unambiguous and clear and provide at least, and preferably, 90 days to file a representation petition. Further, there should also be a broader and clearer "window" period beginning six months before the expiration of the contract, and ending on the expiration of the contract.

The statement of the case, specific facts, and procedural history will not be addressed again here, as these issues are well covered in briefs filed by Petitioner, Mountaire, and UFCW Local 27. Instead, this Brief will go to the arguments that lead to the proposed resolution of the issues presented by the Board.

1. **The elimination or at least substantial modification to the current Contract Bar Doctrine is a logical and necessary outgrowth of the final rule issued by the Board on April 1, 2020**.

These amendments relate to the rules and regulations as to the filing and processing of petitions for a Board-conducted representation election following an employer's voluntary recognition of a union as the majority-supported collective-bargaining representative. Representation-Case Procedures: Election Bar; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed. Reg. 18,366 (Apr. 1, 2020); NLRB Rules and Regulations Section 103.21. In its statement of reasons for proposed changes to the

voluntary-recognition bar, the Board discussed the history of how an employer's voluntary recognition of a union would not only immediately bar the filing of an election petition for a reasonable period of time, but if the parties reached an agreement during that reasonable period, the Board's Contract Bar Doctrine would continue to bar election petitions for the duration of the agreement, up to three years. NLRB Rules and Regulations, supra, at 18,367, quoting *Dana Corp.,* 351 NLR 434 (2007). The Board concluded that the voluntary-recognition-bar "should be modified to provide greater protection for employees' statutory right of free choice and to give proper effect to the court-and-Board-recognized statutory preference for resolving questions concerning representation through a Board secret-ballot election." *NLRB Rules and Regulations*, *supra*, at 18,367. Thus, voluntary recognition would not bar an election unless: (a) affected bargaining-union employees receive adequate notice of the recognition and of their opportunity to file a Board election petition within 45 days; and (b) 45 days have passed from the date of notice without the filing of a validly-supported petition. The Board further stated that: "If the notice and window-period requirements have not been met, any post recognition contract will not bar an election." *Id.*

In another context in that regulation, the Board looked to and relied upon the importance of employee rights under Section 7 as set forth in *International Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731 (1961). *NLRB Rules and Regulations*, *supra*, at 18,369. The regulation discusses case law interpreting *Garment Workers* to the effect that: "(a) an agreement between an employer and union is void and non-enforceable . . . if it purports to recognize a union that actually lacks majority support as the employees' exclusive representative." Id. (citing *Nova Plumbing v. NLRB*, 330 F.3d 531, 536-37 (D.C. Cir. 2003)).

One can only conclude from the Board policy as set forth in the regulation, that any limitation on employee efforts to reject or change their bargaining representative runs counter to the major policies of the Act, and that one of those principle policies is that a bargaining agreement should be void if it purports to recognize a union that lacks majority support.

The same policies also should apply to the Contract Bar Doctrine, and mandate the proposed elimination, or at least substantial modification, of that doctrine. In comments to the April 1 regulation, the Board stated that: "We nonetheless believe that giving employees an opportunity to exercise free choice in a Board-supervised election without having to wait years to do so is still solidly based and justified by the policy grounds already stated." Id. at 18,383.

To the extent comments were received that such employee choice would have negative effects, the Board noted that: "There is no evidence that, under *Dana*, voluntary recognition was less frequent, . . . [as] only 7.65% of *Dana* notice requests resulted in election petitions – and approximately three-quarters of those resulted in a continuation of the bargaining relationship, with the additional benefits of Board certification." Id. at 18,384. Of course, "if the union was decertified after a contract had been signed, the contract would lose effect." *Id. at 18,384 (citing Wayne Country Neighborhood Legal Servs.*, 333 N.L.R.B. 146, 148 n.10 (2001); *RCA Del Caribe*, 262 N.L.R.B. 966 (1982); *Consol. Fiberglass Prods.*, 242 N.L.R.B. 10 (1979).

Thus, the Board in its regulation rejected any arguments that the rule would undercut industrial stability. Id. at 18,385. The Board concluded that: "There is significant value in allowing employees an opportunity to petition for a Board-conducted election," and that the April 1 regulation was ". . . an attempt to provide greater protection of employee free choice in selection of a representative. . . ." Id. at 18,386.

All of the reasons for the April 1 regulation apply equally to the elimination of the Contract Bar Doctrine, or at least its substantial modification. No one can argue with the conclusion that employee free choice is a primary purpose of the Act. As stated by the D.C. Circuit: "The raison d'etre of the National Labor Relations Act's protections for union representation is to vindicate the employees' right to engage in collective activity and to empower employees to freely choose their own labor representatives." *Colo. Fire Sprinkler, Inc. v. NLRB*, 891 F.3d 1031, 1038 (D.C. Cir. 2018). The Act permits exclusive representation only if a majority of employees support that union's representation. *See Garment Workers*, 366 U.S. 731; 29 U.S.C. §§ 159(a), 159(c)(1)(A). As stated by the Supreme Court: "There could be no clearer abridgment of Section 7 of the Act than to grant exclusive bargaining status to an agency selected by a minority of its employees." S*ee Garment Workers*, 366 U.S. at 737. To the extent one argues that this policy choice must be balanced by interests of industrial stability, the April 1 regulation with its discussion of the history and effects of the rule in *Dana* illustrates that this concern would be of minimal effect, as the *Dana* rule has proven to have no significant impact on industrial stability.

2. **Congressional intent suggests elimination or at least modification of the Board's current Contract Bar Doctrine.**

Section 7 of the Act specifically protects employee rights to not only form, join or assist labor organizations, but ". . . also have the right to refrain from any or all such activities . . . ," 29 U.S.C. § 157. Further, Section 9 grants employees the right to file election petitions, and Section 8(a)(3) precludes discrimination ". . . to encourage or discourage membership in any labor organization." *Id.* § 158(a)(3). Further, 29 U.S.C. § 159(e)(1) allows a secret ballot election where "30 per cent or more of the employees in a bargaining unit covered by 'an applicable collective bargaining agreement file with the Board "a petition alleging they desire

that such authority be rescinded . . . .'" The only limitation to this express grant to the workers is that no election may be held where a valid election was held "in the preceding 12-month period." *Id.* § 159(e)(2). The barring of the vote for up to three years is not expressly covered in the Labor Act and seems directly inconsistent with these express statutory provisions allowing such a secret ballot election. Indeed, a three-year contract bar is three times longer than the one-year election bar, a further inconsistency with the express statutory provisions. Similarly, the current "insulated period" during which a union is safe from decertification petitions is twice as long as the period in which a decertification petitioner can file for decertification.

One could also argue that the Contract Bar Doctrine as applied violates the fundamental constitutional rights of freedom of association and freedom of speech as set forth in *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448 (2018). The *Janus* case cites that freedom of speech includes "the right to eschew an association for expressive purposes is likewise protected." Id. at 2463. If freedom of association is protected by the Constitution, then freedom not to associate should also be protected. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984). These fundamental constitutional rights as well as express statutory rights under the Labor Act supersede any dubious and undefined public interest in labor relations stability.

3. **Pertinent history supports elimination of the Contract Bar Doctrine and/or its substantial modification**.

It is interesting and important to consider the history of collective-bargaining relationships in examining the Contract Bar Doctrine. The beginning of that history is to note that the statute itself includes only one bar to elections – the "election bar," which prohibits elections for one year after a valid election has been conducted. 29 U.S.C. §§ 159(c)(3), 159(e)(2). In light of the fact that this is the sole limitation Congress placed on employees' rights to petition for elections, it suggests the Board's current Contract Bar Doctrine deviates from the

statute Congress enacted. The deviation is further significant because it can last three years, rather than the one-year limitation in the statute. This is undoubtedly why the Board initially rejected the contract bar in its earliest interpretation of the Act. "The whole process of collective-bargaining and unrestricted choice of representatives assumes the freedom of the employees to change their representatives . . . ." *New England Transportation Co.*, 1 N.L.R.B. 130 at 138 (1936). The *New England* ruling relied in part on the National Mediation Board's election procedures, which recognize employees' full freedom of association and lack any contract bar. Id. at 139.

In considering history, it is important to remember that too much industrial stability may allow or encourage employers and unions to do things to the disadvantage of employees, negating their rights of free choice. Indeed, there was an era of industrial history that we will loosely call the era of "company unions," in which employers sought to install collective-bargaining representatives favorable to it, providing for the grown of company domination over some labor organizations. While Congress reacted to this element of "industrial stability" by passing Section 8(a)(2) in 1947, the potential remains in the law for collusion to occur. For example, nothing in the Act prohibits an employer to "invite" an individual, group, or some other cooperative "labor organization" to come in, organize, and become a collective-bargaining representative.

Even if employers do not seek to invite or encourage a collective-bargaining representative, other employers may offer no resistance to union organization and may even provide some limited assistance to the process, in hopes that such a labor organization will more favorably view the employer's bargaining situation. Indeed, it is submitted that many unions offer themselves as better "partners" of employers than other labor organizations that are more

aggressive in their hostility to employers. Other employers may fear union power in terms of strikes, boycotts or impediments to change, and simply succumb to union pressure in a manner demanded by the union.

In any of these situations, what kind of inducement can an employer offer to a union to satisfy its demands and at the same time support employer interests? While unions may not admit this in public, privately and in practice the most important union demands relate to various forms of "union security" agreements, which perpetuate the union's financial and organizational power. After all, it does not cost the employer much, if anything, to withhold union dues and assessments from employee paychecks, as those costs by law must be borne by employees, not by the employer. Similarly, employers may agree to allow the employee union representatives, such as stewards, to have preferred status in the workplace, like "super seniority," use of paid employer wages to serve as stewards in promoting union interests, union "offices" at the employer's facility, time off to go to union conventions, and other such measures. It is certainly at least possible that some employers may consider such benefits to the union to be a small price to pay for industrial peace or potential cost-savings concessions given by the union to the employer. As part of these concessions, the union obviously wants to remain as the collective-bargaining representative, and it is extremely rare for a union ever to voluntarily withdraw from a collective-bargaining relationship. If the employer is supportive or cooperative with the union's representation, there are many, many measures available to the employer and union, which as a practical matter, make it virtually impossible for employees to select another labor organization as its bargaining representative, or instead to have no union at all.

The above comments are not to say that most union-employer cooperative arrangements suffer these ill effects, but no one can doubt the potential is there, as history demonstrates. So, if

one recognizes the potential for employees to be the losers in such arrangements, what mechanism exists for the avoidance of such inappropriate conduct? It is submitted that there are two main protections that can be offered, one being an opportunity for employees to obtain information to evaluate the employer-union agreement and arrangement, and the other being the right of "free choice," to get a "better" labor organization representative, or have no representative at all. These considerations lead to the next subject.

If one argues that the above considerations do not exist or are non-existent, one needs to look no further than developments concerning one of the oldest, largest, and most powerful labor organizations in the United States, the United Auto Workers. There, some officers of that union have been accused of and, in some cases indicted, for various acts of inappropriate conduct and collusion with employers, all of which is the subject of a great deal of national publicity and litigation. If the leaders of such a powerful and prominent national union have been alleged to go way beyond the concerns suggested herein as to such collusion, obviously the potential is there for other labor organizations too. As such, these concerns are realistic.

4. The abolishment of the contract bar allows employees the freedom of choice to evaluate, and if desired to change or eliminate, the collective-bargaining representative, and such free choice is a primary tenet of the Act.

Unions organize employees generally on the premise that they have the ability to secure better terms and conditions of employment for the workers. Former Harvard Law School Dean Derek Bok has written that the union representative decision rests on three questions: (1) Are conditions within the plant satisfactory? (2) To what extent can the union improve on these conditions? (3) Will representation by the union bring countervailing disadvantages as a result of dues payments, strikes or bitterness within the plant? Derek C. Bok, "The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, supra, at 49, cited in Bodie, *"Information and the Market for Union Representation*, *"* 98 Va. L. Rev. 1

(2008). Even on the union side, Paul Weiler agrees that employees will make a judgment about the value that the union brings to the table, and he believes that the best time for employees to make that judgment is during contract negotiations, after the union has already been chosen. Paul Weiler, *"Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, *"* 96 Harv. L. Rev. 1769, 1811 (1983).

These authorities and others suggest that employees themselves are in a poor position to judge the quality of union representation prior to the securing of services. 94 Va. L. Rev. at p. 25.

Looking at a worker in an organizational campaign as a consumer, employees need information to decide whether having a particular labor representative is in the employees' best interest. Some commentators suggest that such consumers "do not get the appropriate information about the pros and cons of the union representation in the context of the [organizational] campaign." 94 Va. L. Rev., at p. 29. More importantly, once the "services" of union representation have been purchased by a successful union organization campaign, it is very difficult to get out of them. Id. at p. 31. It is only after the organizational campaign that employees can ask questions like: "Did the leaders work hard at the bargaining table, or did they shirk? Could tougher negotiations have produced more? Are the union leaders becoming too cozy – or too confrontational – with management?" Schwab, "Union Raids, Union Democracy, and the Market for Union Control, supra, at 379-80.

It is a fact of industrial life that employees do not truly learn the pros and cons of a union until after the collective-bargaining process has begun, and the results of that process can be viewed by employees. If the results of that process are disagreeable to most employees, they are stuck with that labor organization for at least three (3) years. The only way they have to improve their situation in their eyes is the opportunity to replace the labor organization with another labor

organization or vote the union out entirely through a decertification election. 29 U.S.C. § 159(c)(1). These dissatisfied union members may not even get the opportunity to ratify a collective-bargaining agreement, because the law does not require that collective-bargaining agreements be ratified by members in order to create a contract bar. *See Appalachian Shale Prods. Co.*, 121 N.L.R.B. 1160 at 1162, 1162-63 (1958). Further, as discussed later herein, employers and unions can negotiate agreements in ways that employees may never have sufficient information to determine when or if they have an opportunity to decertify the union. Therefore, contract bar rules "are most dangerous when there is collusion between the employer and the union." 94 Va. L. Rev., at p. 39. In fact, the current election bar rules effectively eliminate employees' opportunity for a "knowledgeable waiver" of their Section 7 and Section 9 rights.

5. **Current developments prove further the need to remove the contract bar impediments to workplace democracy**.

The Act as passed, including its namesake Senator Wagner, often used a metaphor of "workplace democracy" in their rhetoric. See, e.g., National Labor Relations Board: Hearings on S. 1958 before the Subcomm. of Education and Labor, 74th Cong. 642 (1935), reprinted in two National Labor Relations Board, "Legislative History of the National Labor Relations Act," 1935 at 1617, 2028 (1985); see also Senator Robert F. Wagner, "Address Before the National Democratic Forum," May 8, 1937, quoted in Leon H. Keyscling, "Why the Wagner Act?" in the Wagner Act, after Ten Years 5, 13 (Louis G. Silverberg Ed., 1945) ("There can be no more democratic self-government in industry without workers participating therein, than there could be democratic government in politics without workers having the right to vote.") Today, however, workers generally do not have the right to vote as in a democratic organization, at least not by secret-ballot, which is mandatory in political elections. Instead, today, a majority of new

organizational relationships come from neutrality and card-check agreements rather than secret-ballot elections. See James J. Brudney, "Neutrality Agreements and Card-Check *Recognition: Prospects for Changing Paradigms*, *"* 90 Iowa L. Rev. 819, 824, 828-30 (2005). Critics of card-check neutrality agreements have cited the lack of a "fully informed elector" under such agreements, as well as the need for employees to "hear views on as many sides of the issue as possible." See, e.g., "Emerging Trends in Employment and Labor Law: Labor-Mgmt. Relations in a Global Econ.: Hearings Before the Subcomm. on Employer-Employee Relations of the H. Comm. on Educ. and the Workforce," 107th Cong. 30 (2002) (statement of Charles I. Cohen) (arguing that the "ultimate" goal of a card-check neutrality agreement is "obtaining representation status without a fully-informed electorate and without a secret-ballot election.") The Board itself has stated that: "Union card-solicitation campaigns have been accompanied by misinformation or a lack of information about employees' representational options." *Dana Corp.*, 351 N.L.R.B. 439 (2007). Indeed, it has been reported that the vast majority of union-represented employees in the United States, 94%, have never voted for the union that exclusively represents them.
James Sherk, "Unelected Representatives: 94 percent of Union Members Never Voted for a Union," Heritage Found., *Backgrounder* No. 3126 (Aug. 30, 2016), http://www.heritage.org/research/reports/2016/08/unelected-representatives-94-percent-of-union-members-never-voted-for-a-union.

Thus, one can only conclude from this analysis that: "There could be no clearer abridgment of Section 7 of the Act" than to "grant exclusive bargaining status to an agency selected by a minority of its employees." See *Garment Workers*, 366 U.S. at 737. Further, current conditions where employees do not always have the right to a secret-ballot together with

the limited, confusing, and unworkable procedures to gain such a right, lead to the inescapable conclusion that employees need more information and clearer rights if workplace democracy is to be retained under the Act.

6. **The example of solicitation rules serves as a guide for a simplistic and workable decertification process**.

Section 7 is considered to be the most important part of the Act, and protects employees' rights to "self-organization, to form, join, or assist labor organizations, or to refrain from any and all of such activities." An obvious example of applying these rights to the workplace, and possibly

its most direct application, pertains to employee rights to join, not join, or eliminate, a labor organization in the workplace. The Board, in evaluating competing interests in Section 7 rights against property rights and others, has developed the concept that there must be clear rules as to when an employee can and cannot engage in such activities on the job. These rules are generally known as "solicitation" rules. The Board has considered these rules to be so important that an ambiguity in such rules is considered inappropriate and thus unlawful. Thus, to be presumptively valid, the rule prohibiting solicitation must incorporate a clear statement of its scope and limitations. *Head Div., AMF, Inc. v. NLRB*, 593 F.2d 972 (10th Cir. 1979). The wording of a non-solicitation rule is significant, and where the rule is susceptible to different interpretations, the risk of ambiguity must be borne by the employer. *See, e.g.,* S*t. Joseph's Hosp.,* 263 N.L.R.B. 375 (1982). Ambiguous rules will be found unlawful unless clarifications narrowing interpretations of overly broad rules have been effectively communicated to an employer's workforce. *See, e.g., Chi. Magnesium Castings, Co.,* 240 N.L.R.B. 400 (1979), a*ff'd,* 612 F.2d 1028 (7th Cir. 1980). For example, the concept has developed that bans on solicitation during working time are lawful, but bans on solicitation during "company time," or during

"business hours," or "working hours" remain invalid. *Compare Our Way*, 268 N.L.R.B. 394 (1983), with *NLRB v. Chi. Metallic Corp.*, 794 F.2d 527 (9th Cir. 1986), *Ichikoh Mfg.*, 312 N.L.R.B. 1022 (1993), and *Nations Rent, Inc.*, 342 N.L.R.B. 179 (2004). In determining the validity of the rule, the rule can be ambiguous and unlawful on its face despite evidence of non-enforcement. *Ichikoh Mfg.*, 312 N.L.R.B. 1022 (1993). The concept has developed for many years that any prohibition on such Section 7 activities must be clear to employees exactly what is and is not prohibited.

Comparing these general and well-accepted concepts, the current contract bar principle shows the inappropriate and arcane policies that exist under the current rules. Employers and unions that want to maintain their relationship have numerous and an almost insurmountable number of mechanisms to make their relationship long-standing or permanent, through devices such as short-form agreements, premature extensions, extension agreements, automatic renewal provisions, confusion about whether statutory period ends when contract was agreed to or its effective date, incorporations by reference of other documents, confusion over successorship contracts, changes in expiration dates of the contract, secret agreements, and uncertain expirations dates. No one can doubt the potential for an employer and union to purposely design contracts with hidden window periods designed to avoid representation petitions filed by unwary employees. In one case, for example, the labor agreement incorporated by reference a second contract containing an automatic renewal provision not apparent in the primary labor agreement, which was a memorandum of agreement. *Smith's Food & Drug Centers, Inc.*, No. 27-RD-141924 (Order dated Feb. 13, 2015). The effect of all these details is not only to create an ambiguity, but a virtual impossibility for a lay person petitioner, such as the petitioner herein, to figure out when or if they have the right to secure workplace democracy by a petition for a

secret-ballot election. This situation is clearly one that Congress did not intend when it enacted the Wagner Act, the statute that furthers the central purposes of workplace democracy and the avoidance of a minority union, which *Garment Workers* has deemed critical. Further, the current ultra-complicated Board rules on the timeliness of a petition is certainly "administratively burdensome." *Pacific Coast Ass'n*, 121 NLRB 990 at 992 (1961).

7. **Industrial stability is not served by perpetuating a minority union.**

If employee free choice and majority rule is a "bedrock principle" of the Act, then under any balancing of interests, the threat to "industrial stability" or "labor peace" must be incredibly strong to offer a countervailing interest. Few, if any, would argue that the maintenance of a minority union not favored by a majority of workers supports either industrial stability or labor peace. Indeed, it might be argued that if an employer and union cooperate to maintain industrial stability or labor peace for a minority union, then labor "peace" is not worth such a high price.

This is particularly significant since large portions of the Act protect employee free choice and majority rule, but nothing in the Act sets forth the Contract Bar Doctrine. The specific and expressed provisions of the Act should clearly override any erroneous and subsequent Contract Bar Doctrine that contradicts the Act's well-established "bedrock principles of employee free choice and majority rule." *Gourmet Foods, Inc.*, 270 N.L.R.B. 578, 588 (1984) (member Dennis, concurring).

Further, the concept of "industrial stability" under a minority union is not a real one, but instead tramples on otherwise applicable employee rights. Employees do not even have a right to vote on the union's agreement. See, e.g., *Houchens Mkt. of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208, 212 (6th Cir. 1967); *N. Country Motors Ltd.*, 146 N.L.R.B. 671 at 674 (1964). Combining the lack of a ratification vote and the almost unanimous inclusion in CBAs of

mandatory arbitration and no-strike clauses, leads to a situation where employees, rather than having additional rights, are deprived of the rights they would otherwise have to protest their terms and conditions of employment, as any violation of a no-strike clause can result in their immediate discharge. *See NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953). Again, if this is labor peace, it comes at too great a price.

If an employer-union relationship is based on a minority union, potential encouragement of collusion to the disadvantage of employees is enhanced. Indeed, the history of the "company union" era shows this to be a fact, although parties now are much more sophisticated in the mechanisms they use to prolong such a bargaining relationship.

Further, there is no necessary correlation between elimination of the contract bar and a decline in industrial stability. This has been shown by the history of the similar recognition bar doctrine under *Dana Corp.*, 351 N.L.R.B. 434 (2007). Under the limits on voluntary recognition bar as set forth in *Dana*, the subsequent subject of the Board's April 1, 2020 regulation, only 7.65% of *Dana* notice requests resulted in election petitions, and approximately three-quarters of those resulted in a continuation of the bargaining relationship, with the additional benefits of Board certification. Representation-Case Procedures: Election Bar; Proof of Majority Support in Construction-Industry Collective-Bargaining Relationships, 85 Fed. Reg. at 18,384. Further, entering into of contracts between employers and unions longer than three years has not generated an "avalanche" of decertification petitions, even where such contracts have exceeded three years. Indeed, a number of years ago, the United Steelworkers of American entered into a 15-year collective bargaining agreement, and no elections were held challenging its validity, lending further proof to the lack of harm resulting from the elimination of the contract bar.

8. **Other public policies, including the anti-trust laws, counsel against concerted actions in restraint of trade, a concept applicable to employer union collective bargaining**

agreements, and counsel against long-term restraints of trade without opportunities to exercise employee free choice.

If anything, the dangers to society from inappropriate collusion are even greater now, because of the power given to employers and unions under the anti-trust exemptions for collective bargaining agreements. These anti-trust exemptions did not exist when the Labor Act was passed back in 1935, but now they are a well-accepted part of our legal system. It has been said that the purpose of unionization is to create a labor "monopoly," and such "monopolies" are largely protected from the competitiveness requirements of the anti-trust laws, as well as the free market, the bedrock of the American economy. If such power is to be granted an employer and union in a collective bargaining situation, there must be a strong countervailing consideration to justify such market restrictions, and in this case, there should be a minimum requirement of "majority" rule, a concept which the Contract Bar Doctrine does not support and indeed discourages.

Thus, the concept of the anti-trust laws has been to prohibit conspiracies and other actions in restraint of trade, a concept that seems to conflict with the historical purposes of unions to eliminate economic competition among workers. See generally, Wimberly, et al., Construction Industry Labor and Employment Law, Chapter 23, at p. 23-17. (BNA, 2015.) While initially the common law considered concerted activities of unions to be unlawful conspiracies and restraints of trade, later doctrines developed through various federal laws that were passed that were more liberal to labor unions, and the courts began to develop doctrines of deciding which union activities were unlawful restraints of trade or not. Id.

The courts ultimately developed the concept of a "statutory exemption" that applied if the union acted in its own self-interest and did not combine with non-labor groups. *See, e.g.,* U*nited States v. Hutcheson,* 312 U.S. 219, 232 (1941). Later, the Supreme Court also developed a non-

statutory exemption whereby the combination would be deemed exempt if the union's primary purpose was to directly benefit its members' wages and working conditions. However, if some other purpose was found to be primary, and the combination had the effect of restraining trade in a significant way, the union would lose the anti-trust exemption. *See, e.g., United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

The concept emerged that if there is a type of restraint on the market with substantial anti-competitive effects, there would be no application of the non-statutory exemption from anti-trust laws, unless the combination served a legitimate and lawful goal. See Wimberly, Id. at 2018 Cumulative Supplement, p. 138, citing and discussing *Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge*, 815 F.3d 43 (1st Cir. 2016), and *White v. R.M. Packer Co.*, 635 F.3d 571 (1st Cir. 2011).

Because the Mountaire agreement with UFCW Local 27 by definition does not involve a union acting alone, but instead as an agreement with an employer, the statutory anti-trust exemption cannot apply. The legitimacy of such an agreement under the non-statutory exemption depends upon whether the restrictions served a lawful and legitimate labor goal, and case law indicates that other legitimate interests must be considered in the analysis.

It is submitted that the policies of the anti-trust laws as enunciated in the Sherman Act and other anti-trust acts, as well as the policies of the Labor Act, encourages if not mandates that long-term agreements in restraint of trade should not be supported where other important legitimate interests are adversely affected. Exemptions allowed under the anti-trust laws can and do place certain restrictions on employer/union combinations in restraint of trade, including a collective bargaining agreement. For these reasons, there is a legitimate interest in a democratic country of having employee free-choice as set forth in the policies in the Labor Act, and such

policies require that such long-term combinations in restraint of trade be limited where there is a trampling of otherwise applicable free-choice policies.

9. **The current system of contract bar rules and election petitions is broken, and the best fix is elimination of the contract bar.**

There are so many complicated rules as to the timely filing of a representation petition under the current Contract Bar Doctrine, that it takes a team of "Philadelphia lawyers" to attempt to figure them out. Even worse, the parties can "disguise" the situation so much that it is virtually impossible to timely file such a petition. Consider the following examples.

There can be differences in the signing date of the CBA, and the effective date of the CBA, both of which contain ambiguities and debatable legal issues when the "open period" that normally falls 60-90 days before the end of a three-year contract occurs, or during a contract hiatus. Further, many contracts have automatic renewals, leading to a contract bar. See *Smith's Food & Drug Centers, Inc.*, No. 27-RD-141924 (Order dated FEB 13, 2015). Further, many parties sign short-form or Memoranda of Agreement and incorporate other documents by reference, in circumstances where there might be an automatic renewal provision in the incorporated document but not in the short-form agreement. *Id.* A lay petitioner has no way of getting the facts, much less interpreting the law, in determining when, how, or if the petitioner might exercise his or her Section 9 rights to petition for a secret-ballot election.

There have actually been cases litigated where during the term of the contract, the parties have changed the expiration dates, making it virtually impossible to determine the open periods, under circumstances where even NLRB information officers did not know how to advise the petitioner of Section 9 rights. See *Forsythe Transportation, Inc.*, No. 05-RD-068230 (Order dated Dec. 2011). The situation is so complicated that by the time employees learn of the open period in which they might exercise their rights, the 30-day window period may have already

passed. This leads to the potential for another three-year contract bar that could potentially be an inappropriate maintenance of a "minority" union.

Even after the existing CBA expires, Board precedent creates an equally confusing situation for petitioners regarding the contract hiatus rules. There has been a great deal of litigation on what constitutes a valid contract for purposes of ending the contract hiatus, which again, "Philadelphia Lawyers" would have difficulty interpreting and applying. A potential lay person-petitioner has no knowledge in most instances of the status of negotiations, much less the legal rules applicable as to when a timely representation petition might be filed. The lack of knowledge available to potential petitioners is exacerbated by the fact that there is no obligation on labor organizations to report the status of negotiations, or even to have a ratification vote. Indeed, there is nothing legally prohibited about an employer and union rushing into an agreement to avoid a contract hiatus such that petitioners can exercise their Section 9 rights.

Further, there is no requirement of a signed contract to constitute a bar. See, e.g., *Television Station WVTV*, 250 N.L.R.B. 198 (1980) (initials next to a tentative agreement sufficient despite later date set for the actual signing of the contract); *Riverside Hosp.*, 222 N.L.R.B. 907 (1976) (employer's cover letter constituted a signature of the contract).

It is submitted that the Board should follow through on the unachieved concept it stated in *Appalachian Shale Prods. Co.*, 121 N.L.R.B. 1160 (1958), and re-examine its contract bar rules with a view towards simplifying and clarifying their application, or in the alternative, eliminate the contract bar rules entirely.

10. **The current agreement cannot be a bar because of its illegal union security clause.**

The law is clear that a union security clause must give employees at least 30 days to become union members. 29 U.S.C. § 158(a)(3). Failure to provide the mandated statutory grace

period automatically invalidates the union security clause, and the CBA containing such an illegal union security clause cannot serve as a contract bar. *Compare Paragon Prods. Corp.*, 134 N.L.R.B. 666 (1961) with *Keystone Coat, Apron & Towel Supply Co., 12*1 N.L.R.B. 880, 884 (1958).

On its face, the union security provision in the Mountaire Agreement requires employees to join "31 days following the beginning of their employment." Rejecting the express terms, the union argues that employment only "begins" once the agreement is executed, not at the time of hire. The union argues that no employment before the execution date could be "covered by the agreement." The union also argues that there is no record evidence that any employee was actually denied the 30-day grace period.

This provision in Section 8(a)(3) is considered "among the most carefully considered and completely defined elements of the policy embodied in the Taft-Hartley Act." *Keystone Coat at* 884. As such, there is no excuse for not applying the plain terms of the Agreement, as otherwise employee rights would be denied or at least "chilled." As noted in the example of solicitation rules discussed herein, critical employee rights under Sections 7 and 9 must be protected by unambiguous rules. including rules as to mandatory union membership and/or financial contributions. There is no clearer application of the need to interpret the Act and the Agreement according to their plain terms, as otherwise lay person petitioners would be "chilled" in their exercise of Sections 7 and 9 rights.

11. **Other issues in which the Board has invited comment**.

Among other things, the Board has invited parties to specifically address formal requirements for according a "bar" application to a contract. As stated herein, these comments suggest that the current contract bar rules are so broken, that the fix should be the elimination of

the contract bar. But in the event the contract bar is continued, it should last no more than one year and begin to run no less than 45 days after the employer and union provide information to employees whereby they know their contract was executed and have the information sufficient to make an informed decision about retaining their union representation. A contract should be formally executed by both parties and the parties given the opportunity to obtain a copy.

Further, if the contract bar is continued at all, there should be and must be a broader and clearer "window" period in which a representation petition may be filed. The first window period should be after the employer and union provide information to employees as indicated above. There should be a second window period beginning six months before the expiration of the contract, and ending on the day of the expiration of the contract in effect, regardless of whether a successor contract has been reached during this time. This concept is consistent with that advocated by Mountaire on p. 14 of its Brief in Support of the Regional Director's Decision and Direction of Election.

Regarding an unlawful contract clause in the CBA, if there is an allegedly unlawful union security clause, the clause must be read according to its plain meaning such that there will be no election bar period if the plain meaning deems the clause is overbroad, even if the contract bar concept is retained.

As to the duration of any contract bar period during which no question of representation can be raised, that should be limited to a maximum of one year, as stated above.

Finally, involving changed circumstances during the term of a CBA, the Board has generally found that an existing contract is not a bar to a representation petition where the contracting union has become defunct, *Pioneer Ninn Assocs.*, 228 N.L.R.B. 1263 (1977), or where the size of the bargaining unit has substantially fluctuated. *Gen. Extrusion Co.*, 121

N.L.R.B. 1165 (1958). Thus, a contract bar will not be found where the contract is not "imparting sufficient stability to the bargaining relationship to justify . . . withholding a present determination of representation." *Frank Hager, Inc.*, 230 N.L.R.B. 476 (1977). An example of such a circumstance is an agreement authorized by Section 8(f), which is not based on majority representation, and therefore does not bar an election. *John Deklewa & Sons, 28*2 N.L.R.B. 1375 (1987), enfo*rced sub nom. Iron Workers Local 3 v. NLRB, 843* F.2d 770 (3d Cir.), cert. *denied, 488* U.S. 889 (1988).

The types of unstable bargaining relationships with the potential for inappropriate minority representation often occur in pre-hire agreements, and in the relocation and consolidation of various work groups. Pre-hire agreements, for example, prior to a "substantial increase" in personnel do not bar an election under traditional Board law. *Gen. Extrusion*, 121 N.L.R.B. 1165 (1958). The *General Extrusion* doctrine recognizes the distinction between a "relocation of operations," and a "consolidation of two or more operations." *Kroger Co.*, 155 N.L.R.B. 546,548 (1965). Thus, existing case law finds no contract bar if changes have occurred in the "nature as distinguished from the size of the operations between the execution of the contract and the filing of the petition, involving: (i) a merger of two or more operations resulting in the creation of an entirely new operation with major personnel changes;" or (ii) "resumption of operations at either the same or a new location, after an indefinite period of closing, with new employees." *General Extrusion Co.*, 121 N.L.R.B. 1167 (1958).

Just as more clarity is needed in the window periods for filing representation elections, there needs to be "bright-line" tests determining whether a representation petition may be filed in pre-hire, relocation, and consolidation situations. Recognizing that majority representation is a keystone of the Labor Act, the resolution of the conflicting interests should be as follows. Where

there is an alleged collective bargaining agreement previously covering less than a majority of persons claimed to be covered under the new and broader bargaining unit, where an election petition is filed within six months of the expansion of the unit, relocation, or consolidation, such an a petition should be processed without a contract bar being applicable when the previously represented bargaining unit is not a majority of the new, expanded, relocated, or consolidated bargaining unit. This resolution would further the policy set forth in *Garment Workers*, of insuring majority representation in situations where that issue is unclear. The addition in the workforce from a pre-hire situation, or in the relocation or consolidation, should not be considered an accretion or a bar to an election in order to serve the critically important statutory policy of employee free choice. See, e.g., *Super Valu Stores*, 283 N.L.R.B. 134, 124 L.R.R.M. (BNA) 1294 (1987); *Safeway Stores*, 276 N.L.R.B. 944, 120 L.R.R.M. (BNA) 1186 (1985); *Rainey Sec. Agency*, 274 N.L.R.B. 269, 119 L.R.R.M. (BNA) 1043 (1985); *Towne Ford Sales*, 270 N.L.R.B. 311, 116 L.R.R.M. (BNA) 1066 (1984), *enforced*, 759 F.2d 1477, 119 L.R.R.M. (BNA) 2488 (9th Cir. 1985). Thus, the contract in a newly created unit consisting of the consolidation of employees from various groups should not serve as a contract bar where the new unit is not staffed by a majority of previously-represented employees with the contracting union. Thus, in situations like *Mich. Bell Tel. Co.*, 182 N.L.R.B. 632 (1970), the collective bargaining agreement should not serve as a bar where a petition is timely filed as set forth herein. Similarly, the Board should no longer distinguish between a "relocation of operations" and a "consolidation of two or more operations" if the total size increases where there is a merger of two or more operations or a relocation of operations at either the same or a new location, and where less a majority of persons in the new unit were covered under the bargaining agreement of the former unit.

CONCLUSION

The *Amici Curiae* support the position of Mountaire and the Petitioner that the overly technical requirements of the current three-year Contract Bar Doctrine is contrary not only to the express terms of the National Labor Relations Act, but also to its primary purpose of employee free choice. An ambiguous later-developed doctrine limiting employee free choice cannot override the Act's express terms and statutory purposes. Further, the statute should be construed to avoid potential Constitutional issues, as set forth in *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 48*5 U.S. 568 (1988), in order to avoid the shadow cast by the U.S. Constitution otherwise. Thus, the Board should modify the current three-year contract bar as suggested herein. In addition, the Board should confirm the ruling of the Regional Director below, that the agreement between Mountaire and UFCW Local 27 contained an unlawful union security clause, and thus could not serve as a contract bar. The union security provision in question by its own terms is invalid, and there is a long history of Board precedent that such terms even if ambiguous, unlawfully chill employees in the exercise of their Section 7 and 9 rights to decertify a claiming to be bargaining representative.

Respectfully submitted this 7th day of 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Amici Curiae* Brief was E-filed with the NLRB's Executive Secretary and served via email on the following parties or counsel this 7th day of October, 2020.

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